1988

Alfred T. Smurthwaite v. John Painter : Petition for Writ of Certiorari

Utah Supreme Court

Taylor D. Carr; Attorney for Respondent.

Peter C. Collins; Winder and Haslam; Attorneys for Appellant.

IN THE SUPREME COURT OF THE STATE OF UTAH

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ALFRED T. SMURTHWAITE,	:	
(Plaintiff)Appellant-Petitioner,	:	(Court of Appeals Case No. 880073-A)
-v-	:	880266
JOHN PAINTER,	:	
(Defendant)Respondent.	:	

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PETITION FOR ISSUANCE OF A WRIT OF CERTIORARI TO THE UTAH COURT OF APPEALS

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IN THE SUPREME COURT OF THE STATE OF UTAH

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ALFRED T. SMURTHWAITE,	:	
(Plaintiff)Appellant-Petitioner,	:	(Court of Appeals Case No. 880073-A)
-v-	:	
JOHN PAINTER,	:	
(Defendant)Respondent.		

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(1) The caption of the case in this Court contains the names of all parties.

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(4) QUESTIONS PRESENTED FOR REVIEW

A. WHETHER THE COURT OF APPEALS ERRED IN DETERMINING THAT AN AGISTMENT BAILMENT RELATIONSHIP CANNOT BE CREATED IN THE ABSENCE OF THE PUTATIVE BAILEE'S EXPRESS AGREEMENT TO EXERCISE CARE.

B. WHETHER THE PUBLIC POLICY OF THE STATE OF UTAH CONCERNING THE WELL-BEING OF ANIMALS IS IMPERMISSIBLY CONTROVERTED BY THE COURT OF APPEALS.

(5) REFERENCE TO REPORT OF COURT OF APPEALS OPINION

The Court of Appeals' opinion in this case appears at _____ P.2d _____, 84 Utah Adv. Rep. 49 (Utah App. 1988); the Court of Appeals Docket Number is 880073-CA.

(6) JURISDICTIONAL GROUNDS

(a) The decision sought to be reviewed was entered June 10, 1988.

(b) No rehearing was sought below, and no extension of time has been sought within which to petition for certiorari.

(c) This is an original petition and not a cross-petition.

(d) The statutory provisions believed to confer on this Court jurisdiction to review the decision in question by a writ of certiorari are Utah Code Ann. §§78-2-2(3)(a) and 78-2-2(5).

(6) STATUTORY PROVISIONS

(a) This case involves, among other things, the Utah Agistor's Lien Statute. It is codified as Utah Code Ann. §38-2-1 and provides, and has, at all times material hereto, provided:

> Every ranchman, farmer, agistor, herder of cattle, tavern keeper or livery stable keeper to whom any domestic animals shall be entrusted for the purpose of feeding, herding or pasturing shall have a lien upon such animals for the amount that may be due him for such feeding, herding or pasturing and is authorized to retain possession of such animals until such amount is paid.

(Emphasis added.)

(b) This case also involves the Utah Animal Cruelty Statute. It is codified at Utah Code Ann. §76-9-301 and provides, and has, at all times material hereto, provided, in pertinent part:

(1) A person commits cruelty to animals if he intentionally or knowingly . . .

(b) Fails to provide necessary food, care, or shelter for an animal in his custody; or

(c) Abandons an animal in his custody . . .

(Emphasis added.)

(8) STATEMENT OF THE CASE

Alfred T. Smurthwaite, plaintiff-appellant, petitions for issuance of a writ of certiorari to the Utah Court of Appeals.

This is an action for damages brought by Mr. Smurthwaite against John Painter, defendant-respondent, in which Mr. Smurthwaite seeks to recover substantial monetary damages for the death of ten of his Appaloosa race-bred broodmares during the winter of 1983-84.

In the proceedings in the Second District Court (Davis County -- Honorable Rodney S. Page), Mr. Smurthwaite pursued his claims against Mr. Painter, through trial, on two alternative theories: simple breach of contract (the trial court rejected Mr. Smurthwaite's testimony that the oral agreement expressly required Mr. Painter to keep his eyes on the horses and let him know if they were in trouble) and breach of an agistment bailment agreement. The District Court found that the agreement was for pasturage only and ruled against Mr. Smurthwaite and in favor of Mr. Painter, no cause of

action, on both theories. Mr. Smurthwaite, recognizing that the District Court's straight contract-law decision was not "clearly erroneous," appealed only on the agistment bailment question. The Court of Appeals (Judges Davidson, Jackson and Garff) affirmed.

Mr. Smurthwaite respectfully submits that the following is a statement of undisputed facts material to the disposition of this Petition:

1. At all times material hereto, defendant-respondent John Painter owned, held as lessee under one or more lease agreements, or otherwise controlled certain land 350-390 acres in size located near 1700 South State near the Great Salt Lake in or near Syracuse in Davis County, State of Utah. Record at 95. Ct. of App. Op. at 1.

2. At all times material hereto, Mr. Painter, who has lived virtually his entire life in the immediate vicinity of the subject land, lived in a house adjacent to the subject land, and Mr. Smurthwaite lived in Salt Lake County, State of Utah, approximately 35 miles from the subject land. Record at 96; Tr., Vol. II, at 27.

3. In the fall of 1981, Mr. Smurthwaite, an experienced owner-breeder of Appaloosa horses, and Mr. Painter entered into an oral agreement, automatically renewable on a month-to-month basis, concerning Mr. Smurthwaite's pasturing

of his horses on the subject land. Record at 95. Ct. of App. Op. at 1, 2.

4. According to the terms of the said agreement, Mr. Smurthwaite was to pay to Mr. Painter $15.00 per head per month for each horse that Mr. Smurthwaite placed or caused to be placed on the subject land. Record at 95. Ct. of App. at 1.

5. In or about the fall of 1981 and from time to time thereafter, Mr. Smurthwaite, pursuant to the said agreement, placed and caused to be placed Appaloosa horses on the subject land, and, through at least December 5, 1983, all such horses were in good flesh and not nearing starvation. Record at 95; Tr., Vol. II, at 37, 56, 135.

6. At some time subsequent to the commencement of the said month-to-month relationship with Mr. Smurthwaite, Mr. Painter entered into an agreement with one Robert Child, according to the terms of which Mr. Child obtained the right to pasture his horses on part of the subject land. Record at 96.

7. Mr. Painter was aware and Mr. Smurthwaite testified that he, Mr. Smurthwaite, was not aware, throughout at least late December 1983, and January 1984, and until the dead horses were found, in early February 1984, of the uncontested facts: (a) that Mr. Child's horses were, during that period, located on a portion of the subject land ("the upper pasture")

visible from the road (1700 South Street) adjacent to which Mr. Painter's house was located; and (b) that Mr. Smurthwaite's broodmares were located on a portion of the subject land that was not visible from the said road ("the lower pasture"). E.g., Tr., Vol. II, at 270; Vol. III, at 5, 68-69.

8. At all times material hereto, the upper pasture contained and the lower pasture did not contain much of a grass known as "crested wheat grass," which grew tall enough to provide pasturage in inordinately severe winters. E.g., Tr., Vol. II, at 219.

9. The winter of 1983-84 was an inordinately severe winter. Record at 131.

10. Mr. Painter had heard, prior to Mr. Smurthwaite's discovery of the dead horses, that other animals were starving to death in the vicinity of Mr. Painter's property and that the Humane Society was investigating. Tr., Vol. II, at 266-67.

11. Mr. Smurthwaite did not set foot on the subject property from on or about December 5, 1983 until February 7 or 8, 1984. Record at 131. Ct. of App. Op. at 3.

12. Mr. Smurthwaite testified that he though that Mr. Painter would let him know if the horses needed supplemental food in addition to that provided by the pasturage naturally available. E.g., Tr., Vol. II, at 30, 31, 35; Vol. III, at 68-69.

13. Mr. Smurthwaite paid Mr. Painter, pursuant to the subject agreement, sums of money, totaling in excess of $5,200.00. Tr., Vol. III, at 69.

14. Mr. Smurthwaite was in arrears on his agreed-upon monthly payments during the months of December 1983 and January and February 1984. E.g., Tr., Vol. II, at 56-58, 244-45, 268; Exhibits L, M, N.

15. On a date or dates in late December 1983, January 1984 and/or February 1984, ten of Mr. Smurthwaite's Appaloosa broodmares died of starvation in the lower pasture. Record at 95.

16. All of Mr. Child's horses survived the winter of 1983-84. Tr., Vol. II, at 271. Ct. of App. Op. at 3.

17. After Mr. Smurthwaite's horses were known to be dead, Mr. Painter informed Mr. Smurthwaite that Mr. Painter would retain custody of Mr. Smurthwaite's surviving horses (also located on the subject land) until Mr. Smurthwaite became current on his payments. Tr., Vol. II, at 250.

18. At the non-jury trial, held on May 21, 22 and 28, 1986, Mr. Smurthwaite put on expert testimony of damages in the approximate principal amount of $94,000.00 for the loss of his broodmares and their unborn foals. Tr., Vol. I, at 57-80; Exhibit X.

19. At trial, Mr. Painter put on testimony to show that the damages, if any, suffered by Mr. Smurthwaite were in

the approximate principal amount of $9,000.00. Tr., Vol. III, at 38.

(9) ARGUMENT FOR ISSUANCE OF WRIT

The two questions presented are interrelated. Mr. Smurthwaite contends that the trial court and the Court of Appeals panel both erred in determining, as a matter of law, that a landowner who receives pasturage monies from an owner of livestock has no duty of care toward the stock or its owner unless he, the landowner, expressly agrees to exercise such care. Mr. Smurthwaite's view is that, as a matter of law, a pasturage-for-pay agreement (whether month-to-month (as here) or for another period of time) constitutes an agistment bailment agreement, and that, as such, like other bailments, it carries with it a duty of care.

He bases his contention on: (1) this Court's decision in Hughes v. Yardley, 19 Utah 2d 166, 428 P.2d 158, 159 (1969) (not cited by the trial court or the Court of Appeals and not overruled or undermined by Baker v. Hansen, 666 P.2d 315 (Utah 1983)), in which this Court appears to have recognized that a "pasturage-only" agreement constitutes an agistment bailment; (2) the clear weight of authority from other jurisdictions (see, e.g., Cox v. Chase, 163 Pac. 184 (Kan. 1917), Cox v. Pithoud, 221 Cal. App. 2d 571, 34 Cal. Rptr. 582 (1963); Vaughan v. Bixby, 142 Pac. 100 (Cal. App. 1914); and Ward v.

Newell, 315 S.E.2d 721 (N.C. App. 1984), holding that purely pasturage relationships -- without an expressly undertaken duty of care by the bailee -- constitute agistment bailments; (3) Utah Code Ann. §38-2-1 (the agistor's lien statute), which includes purely pasturage relationships in its universe of relationships entitling the landowner to a lien and to retain animals (i.e., to exercise some manner of "custody" over them) pastured on his land until pasturage fees are paid to him; and Utah Code Ann. §76-9-301 (the Animal Cruelty statute) which establishes the criminal liability of a landowner who has "custody" of animals and who knowingly does not adequately care for them or "abandons" them.

Mr. Smurthwaite respectfully suggests that it would be appropriate for this Court to grant the requested writ and fully examine the factual background of this case and the legal framework that governs it. It appears that the Court of Appeals decision is at odds with what this Court took for granted in Hughes v. Yardley; it appears that the Court of Appeals paid no heed to the agistor's lien statute (which was relied on, knowingly or unknowingly, by Mr. Painter when he refused to release the surviving horses until Mr. Smurthwaite made payment in the spring of 1984, and which statute, Mr. Smurthwaite contends, automatically vested Mr. Painter with legal "custody" of the horses that died during the time they were dying, inasmuch as Mr. Smurthwaite was then in arrears on his pasturage payments);

and it appears that the Court of Appeals also paid utterly no heed to Mr. Smurthwaite's public policy argument concerning the Animal Cruelty Statute.

It appeared to Mr. Smurthwaite, at the time of trial, at the time of briefing (the trial court's ruling was originally appealed to this Court and referred for decision to the Court of Appeals), at the time of oral argument, and it regrettably still appears (if the Court of Appeals decision is allowed to stand) that, if Mr. Painter had no duty to inform Mr. Smurthwaite that his horses were, in all likelihood, starving to death, a Utah landowner who is owed pasturage money by a livestock owner and who has the statutory right to exercise "custody" over the stock can, with impunity, watch that stock suffer and die and never alert the owner of the stock to what is happening. That, Mr. Smurthwaite contends, ought not to be the law of the State. That consideration is perhaps why other jurisdictions (and this Court in Yardley) have recognized a bailment relationship to exist in "pasturage-only" agreements. And the import of the Court of Appeals decision ought to be fully examined by this Court.

RESPECTFULLY SUBMITTED this 11th day of July, 1988.

WINDER & HASLAM, P.C.

By _____
Peter C. Collins
Attorneys for Appellant-
Petitioner

CERTIFICATE OF HAND-DELIVERY

I hereby certify that, on the 11th day of July, 1988, I caused four copies of the foregoing Petition for Issuance of a Writ of Certiorari to be hand-delivered to the office of Taylor D. Carr, Esq., 350 South 400 East, Suite 114, Salt Lake City, Utah 84111.

COVER SHEET

ASE TITLE:

lfred T. Smurthwaite,
Plaintiff and Appellant,
v.
)hn Painter,
Defendant and Respondent.

Court of Appeals No. 880073-CA

ARTIES:

eter C. Collins (Argued)
inder & Haslam
ttorney for Plaintiff and Appellant
75 West 200 South, Suite 4004
alt Lake City, UT 84101

aylor D. Carr (Argued)
ttorney for Defendant and Respondent
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alt Lake City, UT 84111

RIAL JUDGE:

onorable Rodney S. Page

une 10, 1988 OPINION

This cause having been heretofore argued and submitted, and the ourt being sufficiently advised in the premises, it is now ordered, djudged and decreed that the judgment of the trial court herein be, and he same is, affirmed. Costs to the respondent.

Opinion of the Court by RICHARD C. DAVIDSON, Judge; NORMAN H. ACKSON and REGNAL W. GARFF, Judges, concur.

CERTIFICATE OF MAILING

I hereby certify that on the 10th day of June, 1988, a true and orrect copy of the foregoing OPINION was mailed or personally delivered o each of the above parties.

Case Manager

RIAL COURT:

econd District, Davis County, #36259,

IN THE UTAH COURT OF APPEALS

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Alfred T. Smurthwaite, Plaintiff and Appellant,	)	OPINION (For Publication)
v.	)	
John Painter, Defendant and Respondent.	)	Case No. 880073-CA

Before Judges Davidson, Jackson and Garff.

DAVIDSON, Judge:

Plaintiff Alfred Smurthwaite appeals the district court's judgment in favor of defendant John Painter dismissing Smurthwaite's complaint for no cause of action. Plaintiff relies on two theories: breach of contract and breach of an agistment bailment agreement, both arising from the death of ten of Smurthwaite's broodmares. We affirm.

At all times material hereto, Painter owned, leased, or otherwise controlled 390 acres (hereinafter, "the subject land"), located in Davis County, Utah. The subject land is divided into one 40 acre parcel with approximately 10 acres of pasture referred to as the "upper pasture" and a second 350 acre pasture referred to as the "lower pasture." The two parcels are divided by a large drainage ditch, running roughly east and west. The lower pasture has good grass and water, but does not contain as much crested wheat grass which grows tall enough to provide pasturage during winter months. While Painter's home lies adjacent to the upper pasture, from his home or barn the lower pasture is not visible.

In the fall of 1981, Smurthwaite and Painter entered into an oral agreement, automatically renewable on a month-to-month basis, whereby Smurthwaite would pasture his Appaloosa horses on Painter's property for $15 per head per month. At the end of each month, until November 1983, Smurthwaite counted the number of horses on the pasture to determine the amount owed to

Painter.[1]

Smurthwaite placed horses on the upper pasture in October 1981. According to the oral agreement, Painter had no responsibility to feed or check Smurthwaite's horses, nor to maintain any fences on the subject land.[2] Smurthwaite had free access to come and go onto the property and to move his horses in and out as necessary without any contact or interference from Painter. The lower pasture has three means of access: through Painter's farm, through sewer plant property, and through the south end of the 350 acre parcel by Miller's pond. The sewer plant access is paved and is plowed in the winter.[3]

During the fall and winter of 1981-82, Smurthwaite inspected his horses three to four times each week and twelve times during the 1982-83 winter season. During the spring of 1982, Smurthwaite's horses were moved to the lower pasture. There is dispute as to who moved the horses but Smurthwaite made no objection. The horses remained in the lower pasture from spring 1982 until June 1984.

In the fall of 1982, Painter entered into agreements with others resulting in sheep, horses, and a trailer being placed on the upper pasture. While Smurthwaite testified that he observed the sheep on the upper pasture, he never complained to Painter about the other livestock or his horses being on the lower pasture.

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1. Smurthwaite is an experienced horseman, having been involved in the Appaloosa breeding business since 1967-68. Smurthwaite is aware that a horse can starve to death in two-four weeks. Painter is not an experienced horseman.

2. Smurthwaite's reply brief concedes that Painter had no responsibility to feed nor inspect his horses. However, he does contend that Painter was not excused from all <u>care</u> of the horses. Smurthwaite expected Painter to exercise a modicum of sensory concern, and when reasonably necessary, to communicate his concerns to Smurthwaite.

3. The trial court found that Smurthwaite had used the sewer plant access at least 6 times prior to the 1983-84 winter to move horses in and out.

The winter of 1983-84 was very severe, the first snow falling in November. Smurthwaite inspected his horses on December 5, 1983, but did not inspect them again until February 4, 1984, and then only from the road. He testified he could not identify them as his horses because they were too far away. Three days later, on February 7, 1984, Smurthwaite walked onto the lower pasture and found that ten of his Appaloosa broodmares with unborn foals had died from starvation. All of the horses on the upper pasture survived the 1983-84 winter.

Smurthwaite filed his complaint October 4, 1984, and a bench trial was heard May 21, 1986. The trial court concluded: the agreement did not apply to any particular parcel of Painter's land; no agistment agreement had been made between the parties; Painter did not breach the agreement; and Painter did not owe any duty of care for the livestock nor to inspect the animals nor even to report their condition under the circumstances of this case. The court concluded:

> [H]owever, assuming that such a duty existed and defendant were found to be negligent in carrying out that duty, the Court would conclude that plaintiff in failing to inspect his stock from December 5, 1983, to February 7, 1984, was negligent himself and that said negligence was at least equal to, if not greater, than that of defendant.

The trial court granted judgment to defendant and ordered plaintiff's complaint dismissed for no cause of action.

The dispositive issue on appeal is whether the trial court erred in failing to find an agistment bailment agreement. The Utah Supreme Court defined agistment bailment in Baker v. Hansen, 666 P.2d 315 (Utah 1983), stating:

> It is well established that a contract to care for animals for a specified term, an agistment, is a "species of bailment," and that under such a contract "there is ordinarily an obligation to return or account for the animals at the end of the term."

Id. at 320 (footnote omitted) (emphasis in original). Likewise, the Montana Supreme Court in Heckman and Shell v. Wilson, 158 Mont. 47, 487 P.2d 1141, 1146 (1971), stated:

> The term agistment is characterized by an agreement in which one person agrees to care for and feed animals of another for a consideration, either at a named price or for the reasonable value of the services rendered.

See also 3A C.J.S. Animals § 46 (1973). These cases are in accord with the law of bailment which gives total control and exclusive possession of property to the bailee during the bailment period. 8 C.J.S. Bailments § 23 (1988).

The record indicates that Smurthwaite had total control over his horses in moving them in and out of the subject land. Smurthwaite was responsible for the monthly accounting of horses to determine the rents due. Further, Smurthwaite testified that he did not expect Painter to feed or care for his horses. During the more than two years prior to December 1983, Smurthwaite inspected, fed, and tended his horses at least two to three times a week while Painter had nothing to do with them. There is no showing that Painter had any duty to look after or care for the animals of Smurthwaite.

We decline to take the position urged upon us by Smurthwaite that any agreement for the use of pasture carries with it a duty of care on the part of the landowner. To do so would create a new species of bailment that was never intended or contemplated by the parties. For an agistment bailment to be established, there must be a showing of some duty of care bargained for and accepted by the landowner. There is no such showing in this case.

The judgment of the district court is affirmed. Costs are awarded to respondent.

Richard C. Davidson, Judge

WE CONCUR:

Norman H. Jackson, Judge

Regnal W. Garff, Judge

TAYLOR D. CARR - A0582
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IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT

IN AND FOR DAVIS COUNTY, STATE OF UTAH

ALFRED T. SMURTHWAITE, Plaintiff, vs. JOHN PAINTER, Defendant.	FINDINGS OF FACT AND CONCLUSIONS OF LAW Civil No. 2-36259

The above-entitled matter came on regularly for trial before the above-entitled Court on May 21, 1986, and the Court having heard the testimony of the witnesses and having reviewed the evidence herein, and being fully advised in the premises, hereby finds and rules as follows:

FINDINGS OF FACT

1. That defendant Painter owns and leases certain property in Davis County, State of Utah.

2. That the land in question is divided into one 40 acre cultivated parcel with approximately 10 acres of pasture referred to as the upper pasture and a second 350 acre parcel consisting of pasture referred to as the lower pasture. The parcels are separated by a large drainage ditch running approximately east and west.

3. The plaintiff is an experienced horseman having been involved in the Appaloosa breeding business since 1967-68.

4. The plaintiff, in addition to his experience, has taken many classes on horse care and was aware that a horse could die in two to four weeks from starvation.

5. That the defendant is not an experienced horseman.

6. That defendant resides adjacent to the upper pasture.

7. That the lower pasture is not observable from the barn area or the home on the upper pasture.

8. That the plaintiff and defendant entered into an agreement whereby it was agreed that plaintiff could pasture his horses on defendant's property for $15.00 per head payable at the end of each month.

9. That the defendant had no responsibility to feed or check the horses or even maintain fences.

10. That plaintiff had free access to property to come and go as warranted and to move the horses in and out as he saw fit with no contact or interference with or from the defendant.

11. That the agreement was from month to month.

12. That the horses were brought by the plaintiff and placed on the upper pasture in October of 1981.

13. That the horses were moved down on the lower pasture in the Spring of 1982.

14. That it is not clear from the evidence who moved

them.

15. Plaintiff made no objection to the fact that the horses were on the lower pasture.

16. That the lower pasture had good grass and water.

17. That in the Fall of 1982, 300 head of yearling sheep were placed on the upper pasture by one, Childs, and then in November of 1982 through April of 1983, 600 to 700 head of sheep and 4 head of horses and a trailer were placed on the property by Mr. Marriot all of which was authorized by the defendant.

18. That in the Fall of 1983, 120 head of sheep were placed on the upper pasture by Mr. Childs from October until December 24 and 7 to 10 head of horses were placed on the same parcel from November of 1983 to April of 1984.

19. That plaintiff testified that he inspected his horses every day in the Fall and Winter of 1981 and 1982; then 3 to 4 times each week. That he observed the sheep on the north pasture. The same was testified to also by plaintiff's nephew.

20. During the Winter of 1982 and 1983 plaintiff inspected the horses at least 12 times over the Winter.

21. The horses remained in the lower pasture from the Spring of 1982 until they were taken out in June 1984 and plaintiff at no time ever objected to their being in the lower pasture.

22. The winter of 1983-84 was a very severe winter.

23. That the plaintiff at all times relevant to this matter resided in Murray, Utah.

24. The snow began falling in November of 1983.

25. That plaintiff inspected the horses on December 5, 1983, in the lower pasture and never inspected the horses again until February 4, 1984 and then only from the road where he could not identify his horses as they were too far away.

26. That plaintiff finally on February 7, 1984 walked down in the lower pasture to inspect his horses and found several dead.

27. Plaintiff never at any time complained to defendant about the horses being in the lower pasture or about other livestock being in the upper pasture.

28. The lower pasture had three means of access; one through the defendant's farm, one through the sewer plant property and one on the south end on the 350 acre parcel by Miller pond.

29. The sewer plant access was paved and was kept plowed in the winter.

30. That the plaintiff had used the sewer plant access at least six times prior to the 1983-84 winter to move the horses in and out.

31. That plaintiff, upon finding his dead horses, in-

dicated to defendant that he had "goofed up" allowing the horses to die and was about out of the horse business.

32. That defendant was working full-time at this regular job during the winter of 1983-84 as he had at all times previous and during that winter never went into the fields and never saw any of plaintiff's horses.

CONCLUSIONS OF LAW

From the foregoing the Court concludes that the agreement between the parties was one for pasturage rental only. That defendant had no responsibility to feed or care for plaintiff's animals nor to inspect them or even repair the fences.

That the said agreement did not apply to any particular parcel of defendant's land.

The Court concludes that the agreement between the parties was not an agistment agreement which requires in all cases that the person sought to be charged has some contractual responsibility for the care of the livestock.

The Court concludes that the defendant did not breach the agreement between the parties.

The Court further concludes that the defendant had no duty to care for the livestock or inspect the animals nor even to report on their condition under the circumstances of this case.

Even, however, assuming that such a duty existed and defendant were found to be negligent in carrying out that

duty, the Court would conclude that plaintiff in failing to inspect his stock from December 5, 1983, to February 7, 1984, was negligent himself and that said negligence was at least equal to, if not greater, than that of the defendant.

From the foregoing the Court concludes that judgment should be granted to the defendant and plaintiff's complaint should be dismissed for no cause of action.

DATED this 10 day of July, 1986.

BY THE COURT:

RODNEY S. PAGE
District Court Judge

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the above and foregoing FINDINGS OF FACT AND CONCLUSIONS OF LAW, postage prepaid this 23 day of June, 1986, to:

Peter Collins
175 West 200 South, Suite 4004
Salt Lake City, Utah 84101

SECRETARY

TAYLOR D. CARR - A0582
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IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT

IN AND FOR DAVIS COUNTY, STATE OF UTAH

ALFRED T. SMURTHWAITE, Plaintiff, vs. JOHN PAINTER, Defendant.	J U D G M E N T Civil No. 2-36259

The above entitled matter having been duly tried, on May 21, 22 and 28, 1986, without jury, the Honorable Rodney S. Page, District Court Judge, presiding, the parties having been represented by their respective counsel, Peter C. Collins for plaintiff, and Taylor D. Carr for defendant, and the court having heard the testimony of witnesses and having reviewed the evidence presented, and upon due consideration, having entered its Findings of Fact and Conclusions of Law;

IT IS HEREBY ORDERED that JUDGMENT is entered in favor of defendant and against plaintiff and plaintiff's complaint is hereby dismissed for no cause of action with prejudice, and upon the merits.

DATED this 10 day of July, 1986.

BY THE COURT:

/s/
RODNEY S. PAGE, District Judge

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the above and foregoing JUDGMENT, postage prepaid this 23 day of June, 1986, to:

Peter Collins
175 West 200 South, Suite 4004
Salt Lake City, Utah 84101

LeSee Richards
SECRETARY